Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-6951

JOHN WILLIAM HARRIS,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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III. WHERE THE STATE HAS PROVED, BEYOND A REASONABLE DOUBT, ALL ELEMENTS OF THE CRIMINAL OFFENSE OF MURDER, INCLUDING AGGRAVATING CIRCUMSTANCES FOR WHICH THE DEATH PENALTY MAY BE IMPOSED, MAY THE STATE, CONSISTENT WITH THE DUE PROCESS CLAUSE REQUIRE THAT THE EXISTENCE OF MITIGATING CIRCUMSTANCES BE ESTABLISHED BY A MERE PREPONDERANCE TO REDUCE THE PUNISHMENT?

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OPINIONS BELOW

The opinions below are adequately set forth in the petition.

JURISDICTION

Jurisdiction is adequately set forth in the petition.

QUESTIONS PRESENTED

I. DOES THE DUE PROCESS CLAUSE OF THE CONSTITUTION MANDATE THAT WAIVER OF THE RIGHT TO TRIAL BY JURY BE ACCOMPLISHED IN WRITING?

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STATEMENT OF THE CASE

Petitioner and one James Jerome Royster were indicted by the Franklin County Ohio Grand Jury on a multiple count indictment charging aggravated murder with the specification that the murder was committed to escape detection in another offense and was in conjunction with aggravated robbery, rape and kidnapping; and counts of kidnapping, rape, aggravated robbery and theft. Two other individuals, Eric Maurice and Clarence Smith were indicted on all but the murder offense. Petitioner, represented by counsel, waived trial by jury and elected trial to a three judge panel. Following the verdict, a hearing pursuant to Section 2929.03, Ohio Revised Code, was held to determine existence of mitigating circumstances which would preclude imposition of the death penalty. No mitigating circumstances were found to exist. Petitioner's conviction and sentence of death were accorded full appellate review as of right by both the Ohio Court of Appeals and by the Ohio Supreme Court. Each level of appellate review affirmed both the conviction and sentence by unanimous decision. A motion for re-hearing in the Ohio Supreme Court was denied.

The offense occurred on May 8, 1974. The defendant and others, armed with a sawed-off shotgun, abducted an emergency room nurse from the parking area of a Columbus, Ohio hospital. After robbing the victim, petitioner and the others abducted her in her own car, taking her to petitioner's home. Petitioner raped the victim in his bedroom, then pushed her from the window. Additional rapes took place in an adjacent garage. Petitioner then forced the victim into the trunk of her car while the four assailants discussed her fate. Petitioner, concerned that Mrs. Nichols would be able to identify his home, argued that she should be murdered. Jerome Royster agreed. Smith and Maurice argued against the killing. Petitioner and Royster obtained shotguns and left with the

victim.

In a deserted area used as a dump, while Royster stood guard, petitioner shot Mrs. Nichols in the head with a .20 gauge shotgun. Both assailants then covered the body with a discarded couch and fled the scene and the state. Both were apprehended in Philadelphia, Pennsylvania some days later.

After full oral and written explanations of his constitutional rights as discussed by this Court in Miranda v. Arizona, 304 U.S. 436 (1966), petitioner stated he understood his rights, did not wish to have an attorney present and wished to make a statement. Thereafter, petitioner was given a pencil and paper and left alone. Petitioner wrote the statement set forth verbatim in the opinion of the Ohio Supreme Court, 48 Ohio St. 2d 349 at 356, 357. (The opinion is also set forth as an appendix to the petition.)

Before leaving the Philadelphia Corrections Center for return to Columbus, Ohio, petitioner was again advised of his rights orally and in writing and during the return trip, defendant further discussed his participation in the crimes.

Defense witness Dr. Raia testified that petitioner was within the adult normal range of intellectual functioning and suffered no neurological dysfunction. Because petitioner had claimed use of drugs and was an anti-social personality, Dr. Raia felt petitioner was unable to conform his conduct to the law. Dr. Smith e Incas felt petitioner suffered from pathological intoxication based on petitioner's claimed use of drugs. Neither doctor found any evidence of psychosis or mental defective disease.

Dr. Gere, chief psychiatrist of the Ohio Youth Commission found no evidence of acute psychosis mental illness and no evidence the petitioner was mentally defective.

Following the verdict, psychiatric reports were ordered for purposes of the mitigation hearing. Doctors Harding and Vermeulen found no evidence that petitioner was psychotic or suffered from mental derangement and both found

that petitioner's actions in his crime were rational and goal oriented.

No mitigation of the offense having been found, the petitioner was sentenced to death.

SUMMARY OF ARGUMENT

I. The Sixth Amendment guarantee of right of trial by jury may be knowingly and intelligently abandoned. No specific form of waiver is required. The record shows that after full consultation with counsel, petitioner did elect to waive trial by a jury.

II. The Courts of Ohio, both at trial and upon appellate review as of right, adequately considered both aggravating and mitigating circumstances of both the offense and the offender in arriving at petitioner's sentence. Included in such consideration of mitigation were the petitioner's social history, age, mental condition and personal characteristics. Petitioner was found to be not psychotic, not neurotic but merely to exhibit an anti-social behavioral pattern. Such findings do not preclude imposition of the death penalty.

III. Due process requires that the state establish each element of a criminal offense beyond a reasonable doubt. Once the existence of each element is so established and both the criminal offense of aggravated murder and aggravating circumstances are proved beyond a reasonable doubt, the state may require that circumstances mitigating the punishment must be established by a preponderance of evidence.

IV. The Ohio statutes provide for imposition of the death penalty only for the crime of aggravated murder and only

after aggravating circumstances are established beyond a reasonable doubt. The death penalty in Ohio is precluded unless no mitigating circumstances are shown. In the penalty phase of the Ohio procedure, circumstances of both the offense and the offender are taken into consideration so that the penalty is neither grossly disproportionate to the offense nor inflicted in an arbitrary or capricious manner. Full, statewide appellate review as a matter of right insures uniform application of the law so as to not offend any provision of the Constitution of the United States.

REASONS FOR DENYING THE WRIT

I(a) THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY MAY BE WAIVED BY AN INTENTIONAL RELINQUISHMENT OF THAT KNOWN RIGHT. SUCH WAIVER NEED NOT BE MADE IN WRITTEN FORM TO BE EFFECTIVE. THE RECORD WITHIN CLEARLY SUPPORTS SUCH WAIVER BY THE PETITIONER.

It is clear that the constitutional right to trial by jury may be waived. Patton v. United States (1930), 281 U.S. 276. The standard for waiver of a constitutional right is an intentional relinquishment or abandonment of a known right. Johnson v. Zerbst (1938), 304 U.S. 458. However, there is no constitutional requirement that the waiver be in writing, if the waiver was intelligent, knowing and express. See United States v. McCurdy (1971), 450 F. 2d 283; United States v. Ricks (1973), 475 F. 2d 1326.

Federal Rule 23(B) requiring a written waiver of a full jury of twelve has been interpreted as a procedural rule and where the record clearly reflected a knowing, intelligent waiver by the accused, failure of the accused to sign the written waiver was found not to vitiate the conviction. Id. See also, Williams v. United States (1964), 332 F. 2d 36, cert. denied 379 U.S. 976, where it was held that the defendant's presence and acquiescence in an oral waiver of a jury of twelve made by his attorney in open court, was an

effective waiver binding on the defendant even though he did not affirmatively acquiesce. Accord. Horne v. United States (1969), 264 F. 2d 40, cert. denied. 360 U.S. 934. Nor is failure of the trial court to personally interrogate a defendant regarding a written jury waiver a constitutionally infirmity. Estrada v. United States (1972), 457 F. 2d 255, cert. den. 409 U.S. 858.

Where counsel expressed the desire of an accused to waive trial by jury in open court and the accused did not raise any issue with the procedure, waiver was held effective. See State v. Jelks (1969), 461 P. 2d 473, cert. denied 398 U.S. 966. As noted by the Supreme Court of Arizona in Jelks,

> "[w]e do not believe that justice is better served by sacrificing the time honored system of advocacy to the ritual of magic words.
>
> ". . .and that . . . .
>
> "[c]ounsel should not be relegated to the position of an unreliable mouthpiece."
> Id., at 475-476.

This is in accord with the overwhelming weight of authority. The fact that on the first day of trial appellant entered a plea of not guilty by reason of insanity is of no consequence as even appellant's expert witnesses found no evidence of psychosis or mental deficiency.

Contrary to petitioner's claim that the Ohio Courts did not review the constitutional question of waiver but focused solely on a procedural rule, (Petition, p. 8) each court, from trial to review by the Ohio Supreme Court, examined the record for a knowing, intentional relinquishment of the right to jury trial. Reference to the procedural aspects of an Ohio Rule of Criminal Procedure reflected the original thrust of appellant's argument regarding the waiver. (Parenthetically, we note that the unofficial transcript attached to the petition is not wholly accurate. The official video tape record, referred to by the trial court and the Ohio Supreme Court, reflects defense counsel conferring with the

defendant and stating ". . .You have a right to trial by jury . . . ." That counsel explained the right to jury trial was noted by the Ohio Supreme Court in its decision below. See 48 Ohio St. 2d 351 at 360.)

In thorough review of the record by the trial court, Court of Appeals and the Ohio Supreme Court, it was found that ". . .from its pre-trial stage through the verdict it was clear that appellant and both of his counsel desired to waive a jury trial . . . ." (Opinion below, 48 Ohio St. 2d 360, 361.

There was absolutely no indication to the contrary until the filing of a motion for new trial after the verdict. A valid waiver of trial by jury being demonstrated by the record, it is respectfully submitted that the Writ of Certiorari should not issue.

I(b) THE PETITIONER'S TRIAL PROCEEDED BEFORE A THREE JUDGE PANEL UPON WAIVER OF JURY TRIAL, WITHOUT IRREGULARITY.

As noted by the Ohio Supreme Court, regarding appellant's claim of irregularity in the proceedings, ". . .there is nothing to substantiate appellant's contention. *** We are unable to find any irregularity in connection with appellant's contention." (Opinion below, 48 Ohio St. 2d at 361.)

Accordingly, respondent respectfully submits that the Writ of Certiorari should not issue.

II. UNDER THE OHIO STATUTORY SCHEME, IMPOSITION OF THE DEATH PENALTY IS PRECLUDED IF MITIGATING CIRCUMSTANCES ARE SHOWN TO EXIST. THE SENTENCING COURT AND THE COURTS OF BOTH INTERMEDIATE AND FINAL APPELLATE REVIEW MUST CONSIDER THE NATURE, CIRCUMSTANCES, CHARACTER AND CONDITION OF BOTH THE OFFENSE AND THE OFFENDER IN DETERMINING IF MITIGATION IS PRESENT. NO MITIGATING CIRCUMSTANCES EXIST IN PETITIONER'S CASE.

The Ohio law provides for a bifurcated procedure in capital cases as to guilt and sentence. The jury, or a panel of three judges if right to trial by jury is waived, determines guilt or innocence as to the crime and the specified aggravating circumstances. The presiding judge at a jury trial, or the three judge panel if jury is waived, determines sentence.

After conviction for the crime and an aggravating circumstance, the court must order a pre-sentence investigation and a psychiatric examination. Contrary to the practice in Gardner v. Florida (1977), _____ U.S. _____, 97 S. Ct. 1197, Section 2929.03, Ohio Revised Code, requires that copies of both the pre-sentence and psychiatric report be furnished to the offender or his counsel.

The pre-sentence investigation and report is prepared pursuant to Rule 32.2(B), Ohio Rules of Criminal Procedure, which provides:

"(B) Report

"The report of the presentence investigation shall state the defendant's prior criminal record, the circumstances of the offense, and such information about defendant's social history, employment record, financial ability and means, personal characteristics, family situation, and present mental condition, as may be helpful in imposing or modifying sentence or providing rehabilitative or correctional treatment, and shall state such other information as may be required by the court. Whenever the court, probation officer, or investigator considers it advisable, the investigation may include a physical and mental examination of the defendant."

The judge, or three judge panel if applicable, then considers all relevant information as it relates to the existence of one or more of the three mitigating circumstances set forth in Section 2929.04(B), Ohio Revised Code.

If a mitigating circumstance is shown to exist by a preponderance of the evidence, the penalty is life imprisonment. If no mitigating circumstance is found exist by a preponderance, the death penalty is imposed. Section 2929.03(E), Ohio Revised Code.

Section 2929.04(B), Ohio Revised Code, sets forth the relevant factors to be considered by the sentencing authority and the mitigating circumstances as follows:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:
>
> "(1) The victim of the offense induced or facilitated it.
>
> "(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> "(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

As previously noted, the specified aggravating circumstances are directed to the offense and offender.

The statute as to mitigation likewise directs the attention of the sentencing authority to the nature, circumstances, character, and condition of the offender and the offense.

In State v. Bayless (1976), 48 Ohio St. 2d 73, 357 N.E. 2d 1035, the first case upholding the Ohio death penalty

statute, the court noted that this statute on mitigating factors, as with any legislation, may require judicial interpretation and clarification. Id., at 86. The court further noted that these mitigating factors were to be strictly construed in favor of the defendant to allow the broadest consideration of the mitigating circumstances.

In the subsequent case of State v. Woods (1976), 48 Ohio St. 2d 127, 358 N.E. 2d 1059, the second branch of the syllabus (the law of the case, see Cassidy v. Glossip (1967), 12 Ohio St. 2d 17, 24, 231 N.E. 2d 64), set forth the meaning and standard to be utilized when considering duress or coercion as a mitigating circumstance under Section 2929.04(B)(2), Ohio Revised Code. The court, in Woods, held that this circumstance was to be construed more broadly than the defense of duress, and that this mitigating factor turned on the circumstances of each individual case, including the character of the one sought to be influenced, (Id., at 135), and the nature and circumstances of the offense, the history, character and the condition of the offender, so as to temper punishment out of consideration of the individual offender and his crime. Id., at 137, citing Williams v. New York (1949), 337 U.S. 241.

Likewise, in State v. Black (1976), 48 Ohio St. 2d 262, 358 N.E. 2d 551, in construing the third mitigating factor, the first branch of the syllabus held that the sentencing authority should use the broadest possible latitude in determining the offender's mental state or capacity. The second branch of that syllabus elaborated by stating that the offender's mental state should be considered in light of all the circumstances, including the nature of the crime. Against a claim that the mitigating term was not specifically defined, or was to narrow, the court stated that broadly defined and however evidenced, any mental state or incapacity may be considered in light of all the circumstances. Id., at 268.

In State v. Bell (1976), 48 Ohio St. 2d 270, 358

N.E. 2d 556, the court held that the age of the offender and prior criminal record are relevant facts to be considered in determining the existence of mitigating circumstances under Section 2929.04(B)(2) and (3), Ohio Revised Code. In the opinion, the court indicated that age was a primary factor in determining the existence of a mental deficiency both minority and senility being relevant. Id., at 282.

Petitioner was examined both prior to trial and after verdict, by a total of five mental health professionals. All were in agreement that petitioner did not suffer from any psychosis or mental deficiency. Defense witness Dr. Raia was of the opinion that petitioner was within the adult normal range of intellectual functioning. In the opinions of defense doctors Raia and Smith e Incas, and because the petitioner claimed excessive use of drugs, he was unable to conform his conduct to the law. Yet, in the final review of the cause, the Supreme Court of Ohio stressed that:

> "Nowhere in this record can it be established that appellant was under the influence of drugs on the night of May 8, 1974, and we wish to emphatically state this conclusion." Opinion below, 48 Ohio St. 2d 363, Emphasis supplied.

Psychiatric evaluations by Doctors Harding and Vermeulen (described by defense counsel in the trial court as ". . .the two outstanding psychiatrists in the city . . . .") were received for purposes of the mitigation hearing. Both doctors found no evidence of psychosis or mental derangement and that petitioner's actions in his crime were rational and goal-oriented. Both described petitioner's behavioral characteristics as sociopathic or anti-social personality. Dr. Vermeulen noted that ". . .anti-social personality usually is exclusive of mental illness." (Opinion below, 48 Ohio St. 2d 363.)

Anti-social personality (formerly styled, sociopathic personality) is listed in Volume II of the Diagnostic and Statistical Manual of the American Psychiatric

Association. Under the general category of personality disorders, it is included as a behavioral pattern, not psychotic, not neurotic. Specifically, the anti-social individual is:

> ". . .grossly selfish, callous, irresponsible, impulsive, and unable to feel guilt or learn from experience . . . ."
> (DSM II, 301.7)

As indicated above, the Ohio statutory provisions for imposition of the death penalty are strictly construed in favor of the defendant. Broad consideration is given to the offender's history, character and circumstances under Rule 32.2(B) of the Ohio Rules of Criminal Procedure, Section 2929.03, Ohio Revised Code, and Section 2929.04, Ohio Revised Code. Age, circumstances and mental state were considered by the several examining psychiatrists, the sentencing and appellate courts. Under full review, no mitigation was found to exist. The fact that petitioner exhibits a pattern of selfish, callous and irresponsible behavior does not preclude imposition of the death penalty.

It is respectfully submitted that the Writ of Certiorari should not issue on this question.

III. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT PRECLUDE THE STATE FROM REQUIRING THAT EVIDENCE OF MITIGATION OF PUNISHMENT BE DEMONSTRATED BY A MERE PREPONDERANCE OF EVIDENCE.

In Ohio, and specifically, in petitioner's case, the state was required to and did prove beyond a reasonable doubt both the elements of the crime of aggravated murder and the specific aggravating circumstances which allowed imposition of the death penalty. The Due Process Clause is not violated by then placing a burden upon the convicted felon to show by a mere preponderance, circumstances of mitigation. Patterson v. New York (1977), _____ U.S. _____, 97 S. Ct.; 21 Cr. L. Rptr. 3146. If it is constitutionally permissible to place a burden

of proof on a defendant in the case of an affirmative defense, certainly no due process bar is presented in the case of mitigation of sentence after conviction.

Petitioner alludes to a diagnosis of schizophrenia by Dr. Raia. (Petition, p. 14) We wish to correct the record. Dr. Raia did not diagnose petitioner as schizophrenic. Dr. Raia issued the caveat regarding the conditions of the examination, stating: "It is also possible that this examinee was attempting to exaggerate his problems." (Petitioner's appendix, Exhibit 2) Thereafter, Dr. Raia's diagnosis was anti-social personality, Diagnostic Code, 301.7. This was consistent with all other diagnostic opinions offered to the sentencing court.

Under authority of Patterson v. New York, supra., respondent urges that the Writ of Certiorari should not issue on this question.

IV. THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT IS CONSISTENT WITH THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHICH FORBIDS CRUEL AND UNUSUAL PUNISHMENT, AS APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Respondent, State of Ohio, respectfully submits that the statutory provisions, and procedure, for the imposition of capital punishment in Ohio are consistent with the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment.

As separately discussed below, the death penalty in Ohio, as applicable to premeditated and felony-murder, when specified aggravating circumstances are present and no mitigating circumstances exist, is not grossly disproportionate to the offense.

Nor is the penalty wantonly and freakishly imposed, in an arbitrary or capricious manner, so as to run afoul of the

Eighth Amendment or violate the dictates of Furman v. Georgia (1972), 408 U.S. 238. Specific guidelines, in the name of aggravating and mitigating circumstances, provide the necessary control on discretion focusing on the offense and the offender.

As a constitutionally indispensible part of the process of inflicting the death penalty in the State of Ohio the circumstances, character and record of both the offense and the offender are considered in conformity with this Court's decisions last term in Gregg v. Georgia (1976), 428 U.S. 153; Proffitt v. Florida (1976), 428 U.S. 242; Jurek v. Texas (1976), 428 U.S. 262; Woodson v. North Carolina (1976), 428 U.S. 280; and Stanislaus Roberts v. Louisianna (1976), 428 U.S. 325.

Once convicted, a death penalty defendant has an appeal as of right under the Constitution of the State of Ohio to both an intermediate appellate court and the Ohio Supreme Court. The explicit nature of the specifications of aggravating circumstances and mitigating circumstances allows effective judicial review to assure that the penalty is imposed fairly and not arbitrarily.

For these reasons, and as more fully set forth below, the respondent submits that the framework for the imposition of capital punishment in the State of Ohio is constitutional.

1. The Crime

In the State of Ohio the only crime for which capital punishment may be imposed is aggravated murder (Section 2903.01, Ohio Revised Code). The crime is analogous to what was formerly called First Degree Murder in Ohio (Section 2901.01, 1953 Ohio Revised Code), and other states.

That statute provides:

> "Sec. 2903.01(A) No person shall purposely, and with prior calculation and design, cause the death of another.

> "(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burlgary, or escape.
>
> "(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the revised code."

The relevant culpable mental state of "purposely" is defined in Section 2901.22(A), Ohio Revised Code, as follows:

> "Sec. 2901.22(A) . A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

The death penalty may be imposed only for purposeful, planned murders and for purposeful killings during the course of designated felonies.

Unless the existence of an aggravating circumstance listed in Section 2929.04(A), Ohio Revised Code, is alleged in the indictment, the penalty for aggravated murder is life imprisonment. See Section 2929.03(A) and 2941.14(B), Ohio Revised Code.

2. Aggravating Circumstances

One, or more, of the seven aggravating circumstances listed in Section 2929.04(A), Ohio Revised Code, must be alleged in the indictment and proven beyond a reasonable doubt or the death penalty is precluded. See Section 2941.14, Ohio Revised Code.

The aggravating circumstances are as follows:

> "The offense was the assassination of the President of the United States or a person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice-president-elect of the United

States, or, of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

"(2) The offense was committed for hire.

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

"(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing or attempt to kill another, committed prior to the offense at bar, or, the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

"(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

"(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary."

Two of the agggravating circumstances deal with the status of the victim as a public official or a law enforcement officer. However, the status of the victim alone does not permit imposition of the death penalty, as did the statute considered in Harry Roberts v. Louisiannna (1977), _____ U.S. _____, 97 S. Ct. 1993.

The remaining five aggravating circumstances consider the nature, status, character, or record of both the

offender and the offense committed.

In addition to the verdict as to the substantive offense of aggravated murder, the verdict must include separate findings as to the specification of aggravating circumstances. A guilty verdict for the crime, but not guilty as to the specified aggravating circumstance, results in a life sentence.

3. Procedure after conviction for the crime of aggravated murder and a finding of guilt as to an aggravating circumstance.

The Ohio law provides for a bifurcated procedure in capital cases as to guilt and sentence. The jury, or a panel of three judges if right to trial by jury is waived, determines guilt or innocence as to the crime and the specified aggravating circumstances. The presiding judge at a jury trial, or the three judge panel if the jury is waived, determines sentence.

After conviction for the crime and an aggravating circumstance, the court must order a pre-sentence investigation and a psychiatric examination. Contrary to the practice in Gardner v. Florida (1977), _____ U.S. _____, 97 S. Ct. 1197, Section 2929.03(D), Ohio Revised Code requires that copies of both the pre-sentence and psychiatric report be furnished to the offender or his counsel.

The pre-sentence investigation and report is prepared pursuant to Rule 32.2(B), Ohio Rules of Criminal Procedure, which provides:

> "(B) Report
>
> "The report of the presentence investigation shall state the defendant's prior criminal record, the circumstances of the offense, and such information about defendant's social history, employment record, financial ability and means, personal characteristics, family situation, and present mental condition, as may be helpful in imposing or modifying sentence or providing rehabilitative or correctional treatment, and shall state such other information as may

> be required by the court. Whenever the court, probation officer, or investigator considers it advisable, the investigation may include a physical and mental examination of the defendant."

This report of the history, character, and record of the individual offender along with the circumstances of the particular offense is submitted to the sentencing authority.

A mitigation hearing is held to consider those reports, testimony, other evidence, and arguments on the subject of penalty which should be imposed. The offender may make a statement ot the court, which need not be under oath, and such is subject to cross-examination only if the statement is made under oath. See Section 2929.03(D), Ohio Revised Code.

The judge, or three judge panel if applicable, then considers all relevant information as it relates to the existence of one or more of the three mitigating circumstances set forth in Section 2929.04(B), Ohio Revised Code.

If a mitigating circumstance is shown to exist by a preponderance of the evidence the penalty is life imprisonment. If no mitigating circumstance is found to exist by a preponderance the death penalty is imposed. Section 2929.03(E), Ohio Revised Code.

4. Mitigating Circumstances

Section 2929.04(B), Ohio Revised Code, sets forth the relevant factors to be considered by the sentencing authority and the mitigating circumstances as follows:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:
>
> "(1) The victim of the offense induced or facilitated it.

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

As noted previously, the specified aggravating circumstances are directed to the offense and offender.

The statute as to mitigation likewise directs the attention of the sentencing authority to the nature, circumstances, character, and condition of the offender and the offense.

In State v. Bayless (1976), 48 Ohio St. 2d 73, 357 N.E. 2d 1035, the first case upholding the Ohio death penalty statute, the court noted that this statute on mitigation and the mitigating factors, as with any legislation, may require judicial interpretation and clarification. Id., at 86. The court further noted that these mitigating factors were to be strictly construed, in favor of the defendant, to allow the broadest consideration of the mitigating circumstances.

In the subsequent case of State v. Woods (1976) 48 Ohio St 2d 127 358 N.E. 2d 1059, set forth the meaning and standard to be utilized when considering duress or coercion as a mitigating circumstance under Section 2929.04(B)(2), Ohio Revised Code The court in Woods held that this circumstance was to be construed more broadly than the defense of duress, and that this mitigating factor turned on the circumstances of each individual case, including the character of the one sought to be influenced. (Id., at 135), and the nature and circumstances of the offense, the history character and the condition of the offender, so as to temper punishment out of consideration of the individual offender and his crime. Id., at 137, citing Williams v. New York (1949) 337 U.S. 241

Likewise, in State v. Black (1976), 48 Ohio St. 2d

262, 358 N.E. 2d 551, in construing the third mitigating factor, the first branch of the syllabus held that the sentencing authority should use the broadest possible latitude in determining the offender's mental state or capacity. The second branch of that syllabus elaborated by stating that the offender's mental state should be considered in light of all the circumstances, including the nature of the crime. Against a claim that the mitigating term was not specifically defined, or was too narrow, the court stated that broadly defined and however evidenced any mental state or incapacity may be considered in light of all the circumstances. Id., at 268.

In State v. Bell (1976), 48 Ohio St. 2d 270, 358 N.E. 2d 556, in the second branch of the syllabus, the Court held that the age of the offender and prior criminal record are relevant facts to be considered in determining the existence of mitigating circumstances under Section 2929.04(B)(2) and (3), Ohio Revised Code. In the opinion, the court indicated that age was a primary factor in determining the existence of a mental deficiency both minority and senility being relevant. Id., at 282.

Thus, it may be seen that all relevant information is, or may be, presented to the sentencing authority which by statute and construction of the mitigating circumstances, then determines whether society's best interests are served by exacting the ultimate penalty. This decision is based on the circumstances of the particular offense and particular offender.

This procedure complies with the Eighth Amendment and the dictates of this Court's decisions last term, with the Ohio procedure closely analogous to the procedure upheld in Proffit, supra., and Jurek, supra.

5. Appellate Review

The court of common pleas, in each of Ohio's eighty eight counties, is the court with general and subject matter

jurisdiction in aggravated murder cases for which the death penalty may be imposed.

A court of appeals, with geographical jurisdiction of one or more counties, reviews criminal convictions, judgments, and sentences from the court of common pleas. A defendant upon whom the death penalty has been imposed has an appeal as a matter of right to the court of appeals. Article IV, Section 3, Ohio Constitution. If a timely notice of appeal is not filed a defendant may seek review as a delayed appeal under Rule 5, Ohio Rules of Appellate Procedure.

A death penalty defendant has an appeal as a matter of right to the Ohio Supreme Court, where the conviction and sentence in a capital case has been affirmed by the Court of Appeals. Article IV, Section 2(B)(2)(a)(iii), Ohio Constitution.

Thus, an aggrieved defendant in a capital case, as a matter of right, may have both his conviction and sentence reviewed by the Court of Appeals and the Ohio Supreme Court.

In State v. Bayless (1976), 48 Ohio St. 2d 73, 357 N.E. 2d 1035, the Ohio Supreme Court noted its duties and responsibility in reviewing a capital case.

> "[T]his court has a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges.
> Id., at 86.

Respondent would note that the explicit quidelines contained in the statutory framework for capital punishment facilitates this type of review.

As was noted in State v. Miller (1977), 49 Ohio St. 2d 198, N.E. 2d 419 at 204:

> "This state wide method of review does serve to insure against the arbitrary and uneven imposition of the death penalty."

Based on the foregoing, respondent submits that appellate review in the state of Ohio will assure fairness and even imposition of the capital penalty.

For each of the foregoing reasons, previously stated, the respondent, State of Ohio, respectfully submits that the imposition of capital punishment, under the statutory procedures, of Ohio do not offend the Eighth Amendment. We urge that the writ should be denied.

CONCLUSION

For the reasons advanced in the foregoing brief of respondent, it is respectfully submitted that the Writ of Certiorari should not issue in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(6) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing brief in opposition to the petition for a writ of certiorari were served upon Timothy D. Gerrity, Esquire, counsel for the petitioner, by mailing same to his office at 88 East Broad Street, Columbus, Ohio 43215; by United States Mail, postage prepaid, this 15TH day of July, 1977, and upon Myron Shwartz, Esquire, counsel for the petitioner, by mailing same to his office at 50 West Broad Street, Columbus, Ohio 43215, by United States Mail, postage prepaid, this 15TH day of July, 1977. I further certify that all parties required to be served have been served.

Alan C. Travis

ALAN C. TRAVIS
Assistant Prosecuting Attorney

Counsel for Respondent